In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-382

WADE V. CARTER, JR., ET AL., PETITIONERS

v.

PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners, who are towing locomotive operators employed by the federally-chartered Panama Canal Company, brought this action in the United States District Court for the District of Columbia on behalf of themselves and others similarly situated to recover overtime compensation for hours allegedly worked in excess of the statutory maximum provided in the Federal Employees Pay Act (FEPA), 5 U.S.C. 5544 (a).

Petitioners are employed at one of the three lockage areas on the Panama Canal; the electrical towing locomotives they operate guide ships through the locks. The Canal is run around the clock and each operator works an eight-hour shift. The operator's duty post at the start of the shift is the locomotive, which he walks to after passing through a gate at the entrance to the lockage area (Pet. App. 19a). If the locomotive is located at the farthest point from the entrance gate, it would take the operator a maximum of 15 minutes to walk to it. Since a locomotive could end up anywhere along the lock wall at the end of a shift and since operators are not permanently assigned to a particular locomotive, they usually arrive 15 minutes before the start of the shift in order to ensure being at their duty post when the shift begins.[1]

Petitioners argued that the 15-minute period, representing the approximate amount of time they were in the lockage areas preceding each shift change, constituted "overtime work" within the meaning of 5 U.S.C. 5544(a).[2] The district court dismissed their

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[1] Near each gate, at a point where the incoming employees have to pass by, is an assignment board informing each operator of the locomotive to which he is assigned and its location (Pet. App. 19a).

[2] Section 5544(a) provides, in pertinent part:

> An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose *is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours*

complaint, holding that 5 U.S.C. 5544 must be read together with the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-219, as amended by the Portal-to-Portal Pay Act, 29 U.S.C. 251-262, and that as so read the 15-minute period per day did not constitute compensable worktime (Pet. App. 8a-15a). The court also held that under the *de minimus* rule of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, "the time required to look for and place a check mark by a name on the assignment board and walk to a duty station (2 to 15 minutes) is negligible and not compensable" (Pet. App. 16a).

The court of appeals affirmed on the basis that petitioners were not entitled to compensation since the 15-minute period per day did not represent worktime in light of the Portal-to-Portal Pay Act; the court did not reach the question whether the *de minimus* rule precluded recovery (Pet. App. 17a-47a).

The decisions below are correct and further review is not warranted.

1. If petitioners were private employees covered by the FLSA they would not be entitled to overtime compensation under the maximum hours provision in Section 207(a)(1) of that Act, 29 U.S.C. 207(a)(1), since under the amendments to the FLSA in

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a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week * * * [emphasis added].

the Portal-to-Portal Pay Act, 29 U.S.C. 254(a), the following activities are not considered work:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Although the FLSA originally did not apply to Federal workers such as petitioners, see 29 U.S.C. 203(d), in 1966 Congress extended the basic and overtime pay provisions of the Act to cover, among others, Federal employees in the Canal Zone. Act of September 23, 1966, 80 Stat. 841, as amended, 29 U.S.C. 218(b). Therefore, if only the FLSA were considered, petitioners could not successfully argue that they had been paid less than the minimum compensation set by law.[3]

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[3] Petitioners appear to argue that when Congress amended the FLSA in 1966 to cover Federal employees in the Canal Zone by providing that such employees shall not be paid less than the amount provided in Section 207(a)(1)—the FLSA maximum hours provision—Congress did not intend the Portal-to-Portal Pay Act provisions to apply (Pet. 8-9). However, to determine whether an employee is entitled to overtime compensation under Section 207(a)(1), one must decide whether his "workweek" exceeded the maximum of 40 hours. And in order to determine whether certain activities are

Petitioners argue, however, that their entitlement to overtime compensation should be determined solely under the provisions of the Federal Employees Pay Act, and specifically under 5 U.S.C. 5544. But the court of appeals, after thorough consideration of the relevant statutes and legislative history, correctly held that the purpose of the 1966 FLSA amendment, which brought Federal Canal Zone employees within the coverage of that Act, was to ensure that the minimum wage and maximum hours for both private and Federal employees within the area would not differ and that 5 U.S.C. 5544 must therefore be read in conjunction with the FLSA and the amendments thereto in the Portal-to-Portal Pay Act (Pet. App. 27a-35a). Otherwise, "what started out to provide for equality between private employees who were under FLSA and these Canal employees who were not covered, would end up by placing the Canal employees in the superior position" (Pet. App. 35a).

Moreover, underlying petitioners' contentions is the assumption that "overtime work" as used in 5 U.S.C. 5544(a) allows compensation for activities that are not included within the meaning of "workweek" as used in the FLSA maximum hours provision, 29 U.S.C. 207(a)(1)* However, even if the FLSA were

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properly included in the "workweek" one must refer to the Portal-to-Portal Pay Act, which describes the activities that are not to be considered as work within the meaning of the FLSA.

*Section 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any

not specifically applicable to petitioners, as it is, we believe that in determining whether petitioners' activities should be considered as work it would make no difference whether the statute said employees are entitled to overtime compensation for all "overtime work" or that employees should receive such compensation whenever their "workweek" exceeded the maximum number of hours. The question in both instances would be what Congress intended to be included as compensable activity and since the Federal Employees Pay Act does not define "overtime work" as used in 5 U.S.C. 5544, the explicit definition of work in the Portal-to-Portal Pay Act amendment to the FLSA should control.[8]

2. Relying on a recent amendment to 5 U.S.C. 5544 with regard to compensation for "[t]ime spent in a travel status away from the official duty station of an employee," petitioners argue that this provision supplies a definite standard for determining whether they should receive overtime pay in this case.

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workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[8] Since in the Portal-to-Portal Pay Act, Congress rejected this Court's definition of "workweek" in *Anderson* v. *Mt. Clemens Pottery Co.*, *supra*, that Act should be consulted to determine what Congress intended to be considered as compensable activity.

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After examining this amendment and its legislative history, the court of appeals correctly concluded that the "'traveltime' made compensable under Section 5544 by events not capable of administrative scheduling or control was not intended to encompass the [petitioners'] daily two to fifteen minute walks to their locomotives from the gate" (Pet. App. 43a). In this regard, we rely on the opinion below.

8. We also rely on the opinion below (Pet. App. 45a-46a) with respect to petitioners' contention that they are entitled to overtime compensation under cases such as *Abbott* v. *United States*, 151 F. Supp. 929 (Ct. Cls.).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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